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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 57-59.

THE ASSOCIATED PRESS, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE ASSOCIATED PRESS, *et al.*,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY MEMORANDUM OF THE ASSOCIATED PRESS ON THE QUESTION OF SUMMARY JUDGMENT.

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December 21, 1944.

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Appeals from the District Court of the United States for the Southern District of New York.

REPLY MEMORANDUM OF THE ASSOCIATED PRESS ON THE QUESTION OF SUMMARY JUDGMENT.

The memorandum filed by the Government on the question of summary judgment, under date of December, 1944, refers to questions of fact which have already been discussed in detail both in the AP main brief and in the AP reply brief.

It would prolong the argument unduly to repeat that detailed discussion here. We therefore intend herein merely to point out certain of the obvious errors in the Government memorandum and to refer briefly to a few additional matters discussed in that memorandum.

I.

Errors in the Government Memorandum.

Objections to motion for summary judgment.

The Government seeks to create the impression, at pages 4-5, that the defendants have failed by motion, affidavit, assignments and brief to resist the motion for summary judgment. The purport of this Government argument appears to be that the defendants in some manner have waived the right to insist that the burden is on the Government to show that it is entitled to judgment upon facts not of controversial character.

The AP defendants have never made any such waiver.

(a) The defendants naturally did not oppose the motion by counter-motion. Raising objections to motions by counter-motion is frowned upon by the courts. 3 Pike and Fischer, *Federal Rules Service* (1940), p. 666.

(b) The defendants did counter the motion by affidavits —the procedure provided for in Rule 56, Subdivisions (c) and (e), of the Federal Rules of Civil Procedure. The record lists voluminous affidavits "filed in behalf of defendants, The Associated Press, *et al.*, in opposition to motion for summary judgment." Vol. IV of the Record, pp. i-vii; see also R. 1415 and 1433-4.

(c) The defendants did object by brief to the use of such a motion to dispose of a case of this kind. The AP brief below, submitted "in opposition to the plaintiff's motion for summary judgment," not only objected at length to the motion on the ground that material facts were genuinely at issue (as e.g. at pp. 3-4) but objected specifically on the ground that the Government sought by the motion

to "deny to the defendants" either legislative or judicial investigation of the important questions involved (p. 59).

(d) The court below in its opinion clearly acknowledged that upon the motion—thus objected to by the defendants—it was required to dispose of the case upon the basis of the undisputed facts and could not consider controversial factual issues urged by the plaintiff (Op., R. 2581, 2585, 2586-7).

(e) The defendants, finally, specifically assigned error to the action of the court in granting the motion for summary judgment (No. 18), in not denying the motion (No. 19), and in holding that there was no genuine issue between the parties as to any material fact (No. 20). R. 2639.

The AP briefs in this Court, of course, have attacked the motion for summary judgment in great detail. They have stressed in particular that the numerous factual assertions of the Government present "disputed, *triable* issues of fact" which cannot be assumed to be as asserted by the Government on this motion (see e.g. AP reply brief, pp. 49-72; AP main brief, pp. 34-42).

AP by-laws.

The Government refers to the AP by-laws on pages 6-7 and characterizes them in conclusionary language as unlawful.

This is merely a restatement of the principle of "sharing" previously advanced by the Government—which has been answered in the AP reply brief—to the effect that:

(a) the members of AP are not to keep the copy they have created for themselves;

(b) they should be compelled to share that copy with their competitors,

(c) not because they acquired their copy illegally—as part of a monopoly—

(d) not because they are using it illegally—to coerce others—

(e) but solely because it would—so the Government conceives—be of benefit to the competitors to have them do so.

It should be noted that the application of this principle of "sharing" as stated in the memorandum, is not really dependent upon size or popularity or even excellence, but, rather, upon the Government's conception that it would be of benefit to non-members if they could have simultaneous access to the news reports of *all** important agencies—or at least such of them as they may choose (Government memorandum, pp. 9, 17).

We say again—as we said in our reply brief—that this principle of "sharing"—this assertion that competitors are not to have private property in what they themselves have created but are compelled to share with other competitors—not because they acquired the property illegally or are using it illegally—but simply because it would *benefit* the latter—is revolutionary in character—and directly contrary to the previous decisions of this Court (AP reply brief, pp. 16, 17 *et seq.*).

In any event, the question whether the adoption of such a principle would really benefit the newspaper industry—or the reading public—is one of most controversial character. The burden of proof is on the Government to establish that the adoption of such a principle would not in fact destroy initiative; decrease rather than increase competition;

* Note that only 342 newspapers take both AP and UP (F. 68, R. 2615-6). The Chicago Tribune has AP but not UP or INS (R. 1311).

impair the efficiency of all news agencies and their capacity to perform their functions; decrease the number of newspapers and news services; and, as applied to the press, whether it would not destroy the right of first and exclusive publication—which is a fundamental characteristic of property of the mind.

The whole history and background of the industry should be carefully considered before any such revolutionary principle is adopted.

Alleged handicap.

The Government asserts, at page 8, that defendants do not dispute that a denial of AP news reports is a competitive handicap to non-members.

Paragraph 44 of the AP answer, however, denied exactly that (R. 126, see R. 19). The controversial character of the issues raised by the Government on the question of "advantage" is set forth in detail in the AP reply brief pp. 10-12; 37-39; and 49-64.

Assignment of error to Finding 70.

The Government asserts, at page 9, that no assignment of error has been raised to the highly controversial—and self-contradictory—Finding No. 70; which on its face shows that the facts are in genuine dispute.

The Government overlooked the AP Assignment No. 9 (R. 2638), which squarely assigned error to this finding.

This finding of the Court is of no probative value. It says on the one hand that AP aided the growth of competitors and on the other hand that it impeded them. There is no indication whether the net effect was to increase or to decrease competition. Neither is there any indication as to how or the extent to which competition was impeded—or whether the effect was in any way substantial. We contend

that there was no evidence of interference by AP with any competitor.

Alleged need for AP reports.

The Government seeks, at page 10, to minimize the "substantial number" of non-member newspapers that have prospered without AP news.

The Government, however, has been unable to offset this substantial number of successful non-member newspapers with a single non-member newspaper which has failed to start, or has been unsuccessfully operated, or has gone out of business, because it has lacked AP news reports.

II.

Concessions in the Government Memorandum.

The Government, in pages 13-19, in effect concedes itself out of court.

No monopoly.

The Government concedes (p. 13) that it does not contend that AP has a monopoly of news. It only contends that AP has a monopoly of furnishing news in a particular way—or by a particular type of organization.

As long as there is adequate competition, however, it is wholly unimportant that the different agencies have different forms of organization—as e. g. AP, a cooperative—UP and INS, private corporations—and The New York Times, a large newspaper which makes its news available to papers in other parts of the country.

Moreover, there is nothing to show that other cooperative news agencies could not easily be formed. There are hundreds of non-member papers who could form such a

cooperative—and AP does not prevent its members from doing so. In fact the Chicago Tribune, The New York Times and the New York News—all AP members—do offer a substantial combined service in certain parts of the country which could easily be expanded into a service fully adequate for the successful conduct of any newspaper (AP main brief, pp. 21-22; R. 1311).

No unique value.

The Government disavows (pp. 13-14) any contention "that the AP news has unique value because its reports are uniquely free from bias."

No effect on circulation and advertising.

The Government concedes (pp. 14-15) that it does not contend that there is any "correlation between a newspaper's receipt of AP reports and its achieving greater circulation and advertising."

If lack of AP copy—as distinguished from the copy of other services—has no effect on circulation and advertising—then how could it possibly be a handicap to the publishers of a newspaper?

Financial resources.

The Government does not dispute (p. 15) the contention in the AP reply brief (p. 54) that there is no showing that UP or INS—or any of the other agencies—have ever been in the slightest degree hampered by any lack of sufficient funds.

Of course AP does not have "unlimited power to assess its members for cost of operation." If it attempted to exercise such power, its members would drop AP for its competitors.

"Vast and intricately reticulated service."

The Government concedes (p. 15) that UP and INS may also be characterized in the same way and makes no further assertion that non-members of AP are handicapped by not having at their disposal a "vast and intricately reticulated service."

Daily wordage.

The Government repeats (p. 15) that AP furnishes more words than the other agencies. It does not, however, make any attempt to answer the discussion in the AP reply brief to the effect that the number of words supplied by UP and AP to a newspaper *in a particular locality, as e.g., Chicago,* were substantially the same (AP main brief, p. 53) and that there is no showing that any competitive service which is less wordy and more compact is a disadvantage to a newspaper.

Quality of services.

The Government says (p. 16) that it does not dispute that the competitors of AP also furnish excellent domestic and foreign news services.

Representatives of many non-AP papers testified to the quality, adequacy and comprehensiveness of other services, and the court itself found them "comparable in size, scope of coverage and efficiency" with AP (F. 36, R. 2610-1; see also AP main brief, pp. 17-32; 94-99).

Sporadic local situations.

The Government makes no attempt (p. 16) to answer the position taken in the AP reply brief (p. 64) that there is no showing as to how these local situations came about or that AP had anything whatever to do with them. If the Govern-

ment should make any claim of this character—then that claim is not supported by the record.

Decline in number of newspapers.

The Government apparently disavows (pp. 16-17) any claim that inability to obtain AP service has had anything to do with causing such decline.

Full illumination.

The Government refers in a cursory manner (p. 17) to the doctrine of "full illumination" which it had previously asserted in its main brief (p. 89) to be "unnecessary" to consider.

The fallacy of applying this doctrine to the present case has been adequately treated in the prior AP briefs (AP main brief, pp. 33-42; AP reply brief, pp. 68-9).

Exclusiveness an element of value.

The Government (p. 18) apparently concedes now—what it could not well deny—the correctness of the finding of fact below that

> "A large part of the value of news lies in its exclusiveness, reliability, and newness" (F. 29, R. 2609).

The Government also admits (p. 19) that UP and INS have asset-value contracts—215 in the case of UP. We submit that this in itself constitutes a recognition of the fact—so universal in the publishing world—that the right of first and sole publication is a fundamental element of value

III.

Interchange of Credit Information.

During the oral argument the Chief Justice asked counsel for the Government whether it would be proper for a group of manufacturers to collect credit information for their own exclusive use.

The Government concedes (pp. 19-22) that the collection of such information was approved in the *Cement* case, 268 U. S. 588. Furthermore—although it points out that in the *Cement* case no point was raised as to the admission of rival manufacturers—we do not understand that the Government now withdraws the concession made by Government counsel during the oral argument—that such information would not have to be shared with competitors.

We submit that where information is collected as a business—for the very purpose of publication by those who have collected it—and where its value lies principally in the right of first and exclusive publication—and no price fixing or predatory practice or monopoly is present—the same principle would obviously apply.

The Government significantly ignores the further questions:

1. By the Chief Justice—whether a group of stores operating as a chain would have to share the benefits of such operation with competing stores.

2. By Mr. Justice Douglas—whether a group of tire manufacturers—absent monopoly—could not organize a syndicate to buy 30,000 tons of rubber for their joint account without sharing it with other tire manufacturers.

IV.

Disposition of Case.

The Government concludes (p. 23) with the understandable suggestion that if there are genuine issues of fact in this case, the case should now be sent back for trial.

While we quite understand the suggestion of the Government in light of this five-volume record, the fact is that this case is bottomed on a theory not yet embraced in our law. The egalitarian philosophy espoused by the Government, as we have pointed out in our other briefs, has time and again been rejected by this Court.

It seems to us not at all necessary to have a trial on the facts where the Government depends upon a fundamental legal theory which is so patently unsound. We urge, therefore, that the Court dismiss the case.

Respectfully submitted,

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